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WHAT IS A TRANSFER OF TITLE?

Legal analysis may seem dry and profitless to many. What if a profit can come of it after all! In *Hudson & M. R. R. v. State* (1919, N. Y.) 125 N. E. 202, a bit of analysis saved paying a double stock transfer tax. A statute imposed a stamp tax "on all sales, or agreements to sell, or memoranda of sales of stock, and upon any and all transfers of shares . . . whether made . . . by any delivery, or by any paper or agreement . . . and whether investing the holder with the beneficial interest in or legal title to said stock, or merely with the possession or use thereof for any purpose . . ." By a voting trust agreement made in 1908 certain shares were vested in three trustees. In 1913, by a later agreement made by all parties interested, the stock was deposited in escrow, and three banks were empowered to procure the transfer to them of the stock by merely filing a copy of a resolution for that purpose with the depositary, whereupon title was to vest in the banks at once; the banks were further empowered to cause the formation of a new voting trust and to cause the

deposited stock to be transferred to the new trustees; other "broad and flexible powers" were given to the banks to carry out the new agreement by such means as might seem to them expedient. The banks never formally exercised the power to cause title to vest in themselves, but they created new trustees and ordered the depository to deliver the certificates to these trustees. Did this transaction involve two transfers of the stock within the meaning of the tax law, or only one transfer?

It was argued for the State that there were two transfers, that the banks by their order to the depository had caused title to vest in themselves, and that the new trustees could take title only from the empowered banks. The court rightly held that only one tax was due; the agreement of 1913 did not invest the banks "with the beneficial interest in or legal title to said stock," and the exercise of the banks' power caused a single transfer of such title from the old trustees to the new ones, the beneficial interest¹ remaining continuously in the same individuals.

What is legal title and what is a transfer thereof? Of the agreement of 1913 the court says: "Its only effect upon the ownership of or title to the stock was the creation in the managers (the banks) of the *privilege* . . . of acquiring the stock, or of the *right* to direct such other disposition of it" . . . The court says that the "right" was exercised but that the "privilege" never was. Further on, with a nicer discrimination in words, the court says: "The *power* to direct the transfer to the new trustees did exist in the managers through the agreement of 1913." But "that power was not the equivalent of a vesting in them of the legal title to the stock, nor did it necessitate such vesting."

Both the "privilege" and the "right" first mentioned included *powers* vested in the banks. If those powers do not constitute "title" or "ownership," what is lacking? We must first distinguish the operative facts from the resulting legal relations; for "title" is often used to connote both indiscriminately. Such operative facts are the acts of the parties expressing agreement and the physical documents executed thereunder, the delivery and the recording of such documents; these are sometimes described as "the title." But by "title" we usually mean something other than these. We mean that because of the foregoing operative facts certain legal relations exist. We say that one *has* the title or *possesses* title. We mean by this that he may do certain things that other persons may not do, that other persons must do and forbear to do certain things that he is not commanded to do or to forbear to do, that by his own voluntary act he can cause

¹ It is not necessary here to analyze "beneficial interest." Such an interest is also a very valuable part of entire "ownership." It, too, consists of certain limited powers, privileges, rights, and immunities.

new legal relations to exist while other persons cannot. It is of these permissions, commands, powers, and immunities that "title" or ownership" consists. The owner may consume or use or carry away his goods, without societal penalty; these are valuable privileges. The owner will receive societal assistance in preventing other persons from consuming, using, or carrying away; these are valuable rights. The owner can confer ownership, in part or in whole, upon others; these are valuable powers. The owner's rights, privileges, and powers cannot be extinguished by others; these are valuable immunities.

If this is what having title means, it can be seen that one may have part title and not the whole.² So it was with the banks; they had large and valuable powers, that usually pertain to an owner. In complete ownership, however, these powers are exclusive and they are accompanied by exclusive rights and privileges. It does not appear whether or not after the agreement of 1913 the old voting trustees had any rights, powers, or privileges left. In all probability they had some of these left; but they had no immunities with respect to the banks, for the banks had power to divest them of every element of title. The banks in fact exercised this power eventually and caused title to pass to new trustees. It is important for us to know just what elements of title remained in the old trustees while the banks were enjoying such extensive powers; but this is left to surmise. The existence of the powers in the banks, at any rate, did not constitute the whole of title and did not bring them within the meaning of the tax law.

There is no question that the court was correct in holding that the exercise of the banks' power did not constitute two transfers. Far from being a transfer to the banks, it was a transfer from them. It was one transfer of the two parts of title—of such part as still remained in the old trustees and also of the part held by the banks themselves. The extensive powers of the banks were no doubt extinguished by their action; and thereafter if such powers existed at all, they were in the new trustees.

Title is not a physical quantity, and on its transfer we cannot see it jump. It is neither a button nor a bit of sealing wax nor a scrap of paper. But by not having it the banks saved a pretty penny in stamps.

A. L. C.

DUE PROCESS AND INJURIES FROM TERMINATION OF FRANCHISE

The decision in *Johnson v. Lake Drummond Canal and Water Company* (1919, Va.) 99 S. E. 771, seems both unjust and unnecessary. It appears that in 1787 the Virginia legislature incorporated a canal

² For another recent case involving a tax on the "transfer of property," where part but not all of the title had passed, see RECENT CASE NOTES, *sub tit.* TAXATION.